

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KATHY L. WINN

Claimant

VS.

COFFEE TIME, INC.

Respondent

AND

LIBERTY INSURANCE CORPORATION

Insurance Carrier

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Docket No. 1,031,920

ORDER

Respondent appeals the July 6, 2007 preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded medical treatment, with respondent ordered to provide a list of three qualified physicians from which claimant would designate an authorized treating physician. Claimant was also awarded temporary total disability compensation beginning October 13, 2006, and continuing to October 23, 2006. Temporary total disability was denied after October 23, 2006, as claimant quit her job, applied for, and began receiving unemployment insurance benefits on October 24, 2006.

Claimant appeared by her attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, John R. Emerson of Kansas City, Kansas.

The Appeals Board (Board) adopts the same stipulations as the Administrative Law Judge (ALJ) and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held on January 25, 2007, with the attached exhibits; and the documents filed of record in this matter.

ISSUES

Respondent raised the following issues in its Application for Review filed on July 17, 2007, in this matter:

1. That the Administrative Law Judge [s/c] in awarding the claimant additional medical treatment after the claimant had been placed at maximum medical improvement;
2. That the Administrative Law Judge erred in awarding temporary total disability after the claimant resigned her employment and after an accommodated job had been offered to the claimant.¹

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should remain in full force and effect, and the appeal of respondent should be dismissed. Claimant, a pot washer for respondent, suffered injuries to her left arm, shoulder and neck on September 26, 2006, when she pulled a heavy pot full of water from a sink. Claimant came under the care of Mark S. Dobyns, M.D., of Occupational Health Services in the Wichita Clinic. Claimant received conservative treatment, ultimately being released on October 24, 2006, to full duty. However, the October 24, 2006 report of Dr. Dobyns did advise that claimant leave work. The report goes on to state that "I think if she stays off of that job, she should be fine".²

Claimant and Linda Price, respondent's office manager, testified at the preliminary hearing. It is clear that claimant had been returned to work with restrictions, but elected to not remain with respondent. It is also clear that respondent offered claimant light duty within her restrictions, both during a telephone conversation on October 19, 2006, and by letter also dated October 19, 2006, from Daron Cox, respondent's president. The letter specified that claimant was expected to return to work on October 23, 2006. Rather than return to work, claimant terminated her employment with respondent and applied for unemployment insurance benefits.

¹ Application for Review at 1.

² P.H. Trans., Cl. Ex. 1.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁶

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁷

³ K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 2006 Supp. 44-501(a).

⁶ K.S.A. 44-534a(a)(2).

⁷ *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, rev. denied 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

Additionally, the Board may review those preliminary hearing orders where it is alleged that an administrative law judge has exceeded his or her jurisdiction or authority in providing or denying the benefits requested.⁸

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute. The issues raised by respondent are not issues over which the Board takes jurisdiction on appeal from a preliminary hearing order. Whether the ALJ determined the temporary total disability and medical treatment controversies correctly, the fact remains it is the ALJ's right to so determine those issues at preliminary hearing. Respondent's appeal of these issues should be dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Respondent's appeal from the preliminary hearing Order of July 6, 2007, should be dismissed, as the Board does not have the jurisdiction to consider those issues at this time.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 6, 2007, remains in full force and effect, and the appeal of respondent should be, and is hereby, dismissed.

IT IS SO ORDERED.

⁸ K.S.A. 2006 Supp. 44-551.

⁹ K.S.A. 44-534a.

Dated this ____ day of September, 2007.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge